U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: APR 2 3 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). The petitioner filed two motions to reconsider, both of which were dismissed by the Director. The case is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner is a software development company. It seeks to permanently employ the beneficiary in the United States as a senior programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on April 13, 2011. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the Department of Labor (DOL) on April 4, 2007, and certified by the DOL on December 14, 2010.

The minimum educational and experience requirements for the proffered position are described in the ETA Form 9089 as either (1) a master's degree in computer science, engineering, or business, or a foreign educational equivalent, and no experience (Part H, boxes 4, 4-B, 6, 7, 7-A, and 9), or alternatively (2) a bachelor's degree in one of these fields of study and five years of experience (Part H, boxes 8, 8-A, and 8-C). In Part H, box 14 the five years of experience requirement is further defined as follows: "must be post-baccalaureate and progressively responsible in the job offered or in any computer or engineering-related occupation."

To be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). The priority date is the date the underlying labor certification application was received for processing by the DOL. For the instant petition, therefore, the priority date is April 4, 2007.

As evidence of the beneficiary's educational credentials the record includes photocopies of the beneficiary's academic transcripts and degree certificate from the [redacted] in India, showing that the beneficiary completed an 8-semester program of study during the 1990s that culminated with a final examination in May 1998 and the awarding of a Bachelor of Engineering degree in Computer Engineering on December 27, 1999.

According to an academic equivalency evaluation from The Trustforte Corporation submitted by the petitioner, the beneficiary's Indian degree is equivalent to a bachelor of science in computer engineering from an accredited college or university in the United States. This evaluation accords with information in the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which states that a Bachelor of Engineering in India is a four-year degree and comparable to a U.S. bachelor's degree in that field. Consistent with the foregoing evidence the AAO finds that the beneficiary's degree from the is more likely than not comparable to a bachelor's degree in computer science from a U.S. college or university.

Since the beneficiary's degree is not equivalent to a U.S. master's degree, he is not eligible for classification as an advanced degree professional, and cannot qualify for the proffered position under the terms of the labor certification, based solely on his education. Only if the beneficiary has at least five years of qualifying post-baccalaureate experience to go along with his U.S.-equivalent bachelor's degree would he be eligible for classification as an advanced degree professional and qualify for the proffered position under the terms of the labor certification.

As evidence of the beneficiary's work experience the record includes letters from two prior employers in Mumbai who describe the beneficiary's duties as (1) a programmer for from June 10, 1998 to September 17, 2000, and (2) a senior software engineer for from September 18, 2000 to November 8, 2003.[1]

On May 24, 2011, the Director denied the petition on the ground that the beneficiary did not have the requisite five years of qualifying experience between the date he received his bachelor's degree in India and the priority date of the petition. The Director noted that while the beneficiary passed the final examination of his baccalaureate degree program in May 1998, his degree was not conferred until December 27, 1999. Experience gained up to this date, the Director held, was not post-baccalaureate experience. Therefore, the Director calculated the beneficiary's qualifying experience with as running from December 27, 1999 to September 17, 2000. Combining that time with the beneficiary's experience at the Director concluded that the beneficiary had 47 months (3 years and 11 months) of qualifying, post-baccalaureate experience. Since this total fell short of five years, it did not meet the job requirements of the ETA Form 9089.

---

[1] According to the ETA Form 9089, the beneficiary began working for the petitioner as a programmer analyst on November 10, 2003. None of the beneficiary's work with the petitioner up to the priority date of April 4, 2007 can be counted toward fulfilling the five year experience requirement, however, because the ETA Form 9089 states in Part J, box 21, that the beneficiary did not gain any qualifying experience with the employer in a substantially comparable position to the job offered.

The petitioner filed two motions to reconsider, along with supporting documentation. According to the petitioner, the beneficiary earned his bachelor's degree upon the completion of his final examination in May 1998, which would give him more than five years of post-baccalaureate experience in his jobs with [redacted] and [redacted] up to November 2003, thus meeting the experience requirements of the labor certification and applicable regulations to qualify him as an advanced degree professional. The Director dismissed both motions, holding that the petitioner's arguments and the evidence submitted with the motions did not overcome the basis for the denial. After the second dismissal the petitioner filed a timely appeal. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

The sole issue on appeal is whether the Director erred in deciding that the date of the beneficiary's bachelor's degree – for the purpose of calculating post-baccalaureate experience – is when the degree was conferred upon the beneficiary, not when the beneficiary completed his final examination.

The pertinent regulatory language, quoted by the Director in all three of his decisions, is at 8 C.F.R. § 204.5(k)(3)(i)(B). It reads as follows:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by an *official academic record showing that the alien **has** a United States baccalaureate degree or a foreign equivalent degree*, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

(Emphasis added.) The AAO agrees with the Director that the regulatory language highlighted above requires that the beneficiary have his baccalaureate degree in hand, not just be eligible for it, before his "post-baccalaureate experience" can begin to be counted.

The beneficiary's degree certificate from the [redacted] reads, in pertinent part, as follows:

> [redacted] . . . having passed the Bachelor of Engineering degree examination held in May 1998 in the Pass Class, the degree of Bachelor of Engineering (in its Computer Engineering Branch) has been conferred on him at the Convocation held in [redacted] on 27th December, 1999.

The AAO does not interpret this language in the degree certificate as equating the passage of the final examination with obtaining the bachelor's degree. In his appeal brief counsel cites a previously submitted letter from the Principal of [redacted] dated May 10, 2011, stating that "the passage of this examination by [the beneficiary] was the final requirement to be met in order to confer the Bachelor of Engineering degree upon him." In counsel's view, this language confirms "that the beneficiary, in fact, graduated in May 1998." The AAO does not agree with counsel's interpretation of the Principal's letter. The letter concedes that the degree was not conferred at the same time as the passage of the final examination. Although there may be many reasons for the

delay in the award of the degree, the fact remains that the beneficiary did not have a degree until December 27, 1999.

Furthermore, the certificates the beneficiary received after completing his 7th semester examination in December 1997 and his 8th semester examinations in May 1998 were not issued until January 13 and January 16, 1999, respectively. The certificates state that the 7th semester result was declared on December 15, 1998, and the 8th semester result was declared on December 22, 1998. Based on these two documents it appears that the beneficiary's examination results were not determined until December 1998, which means that no degree could have been awarded before December 1998 at the earliest. That means the beneficiary could not have amassed five years of post-baccalaureate experience at and before starting work with the petitioner in November 2003.

U.S. Citizenship and Immigration Services (USCIS) has consistently held in employment-based immigrant petitions under sections 203(b)(2) and (3) of the Act that the date of an academic degree is the date of its conferral as stated on the document itself. While some educational institutions, including the may view the effective date of a degree differently for their own purposes of program completion, graduation, or admission to a further degree program, and some employers may view passage of a final examination as tantamount to a degree for hiring purposes, the AAO is not bound by any such policies or modus operandi in its adjudication of the instant petition.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even internal memoranda of USCIS do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.")

Based on the foregoing discussion, the AAO agrees with the Director that the operative date of the beneficiary's Bachelor of Engineering is December 27, 1999, the date it was conferred upon him by the Since the beneficiary's work experience up to that date was pre-baccalaureate, it cannot be counted as qualifying post-baccalaureate experience under the regulations at 8 C.F.R. § 204.5(k)(2) and 8 § 204.5(k)(3)(i)(B). The record shows, therefore, that the beneficiary had only 3 years and 11 months of qualifying experience before the priority date of April 4, 2007. Thus, while he has a U.S.-equivalent bachelor's degree in engineering, the beneficiary does not have the equivalent of an advanced degree under 8 C.F.R. § 204.5(k)(2).

Accordingly, the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act, and does not qualify for the job of senior programmer analyst under the terms of the labor certification.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.